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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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Office of Secretary

In the Matter of	)	
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Revision of Part 22 and Part 90 of the Commission's Rules to Future Deployment of Paging Systems	)	WT Docket No. 96-18
	)	
Implementation of Section 309(j) of the Communications Act -- Competitive Bidding	)	PP Docket No. 93-253

To: Commission

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**EX PARTE COMMENTS OF TELETOUCH COMMUNICATIONS, INC.
ON THE COMMISSION'S MARKET AREA LICENSING PROPOSAL**

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Summary

The Commission's proposal to convert the shared Part 90 paging channels to exclusive use is ill-founded and contrary to law. The Commission recognized, at the outset of the captioned proceeding, that these channels are heavily licensed in all of the desireable areas, and that the industry is highly competitive and robust. In order to reach this high level of competition, co-channel carriers have created a delicate balance in order to ensure service to their paging customers. An overlay auction would upset this balance. The competitiveness of the industry notwithstanding, the Commission's proposal to convert these ten shared paging channels to exclusive use, and thus, subject to auction, is contrary to Sections 309(j)(7)(A) of the Communications Act of 1934, as amended (the Act), which prohibits consideration of federal revenues to be generated in making a determination that auctions would be in the public interest, and Section 309(j)(6)(E), which requires the Commission to "use engineering solutions, negotiation, threshold qualifications, service regulations, and other means in order to avoid mutual exclusivity in application and licensing proceedings." Shared channel use is a well-established means of avoiding mutual exclusivity.

If the Commission proceeds with its proposal to implement market area licensing on the shared Part 90 paging channels, service to the public will be put at risk. Unlike the exclusive common carrier paging channels, these ten shared paging channels have been regulated under a separate set of rules and standards, which have not been as operational desireable as the Part 22 paging services. As a result, stations have been licensed on these shared paging channels, one-a-top another, much like a stack of pancakes on a platter. Because these channels are shared, licensees have not been entitled to co-channel interference protection and, as such, the Commission has not created service and interference contours for these stations, leaving it instead, to the individual licensees to make the necessary arrangements to share the channel. Licensees have accepted this trade-off in

exchange for the unlimited ability to expand coverage, just as nationwide paging carriers have accepted a build out requirement in exchange for unlimited expansion. It would be arbitrary and capricious to subject shared licensees to an auction when nationwide licensees will be exempt. Both types of entities have invested hundreds of millions of dollars in reliance on the current rules.

Moreover, any conversion of the shared Part 90 paging channels would be detrimental to small businesses, and potentially, could drive many out of business. This is so because small businesses are unlikely to succeed in the auction. Also, the Commission would have to create a new license database for each licensed base station which includes full engineering data, much like that for the Part 22 common carrier paging services. In that the Commission has not previously licensed the shared Part 90 paging channels on this basis, individual field surveys for each base station, to document the full engineering parameters, would be required. This process could result in expenditures of thousands of dollars per base station, for engineering services, especially since field visits would likely be required.

Finally, the implementation of the Commission's proposal would chill many carriers' ability to obtain financing, both public and private, in order to raise the necessary capital to make equipment purchases to update current physical plant and/or expand existing paging systems. Without the availability of public investors or access to private lines of credit, even the most credit worthy carriers who have specialized in providing service on the shared Part 90 paging channels, could lose their flexibility to meet future subscriber demands for service.

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EX PARTE COMMENTS OF TELETOUCH COMMUNICATIONS, INC. ON THE COMMISSION'S MARKET AREA LICENSING PROPOSAL

Teletouch Communications, Inc. (Teletouch), by its attorneys and pursuant to Section 1.206(a)(1) of the Commission's Rules, hereby submits its ex parte comments in the above-captioned proceeding.[1] These comments supplement those filed by Teletouch in the captioned matter on March 18, 1996, and follow up the recent meetings of counsel with members of the Commission's staff.

I. Statement Of Interest.

Teletouch is a publicly-traded holding company which owns 100 percent of the stock of Teletouch Licenses, Inc. (TLI), a licensee in the Paging and Radiotelephone Service, the 929 MHz Private Carrier Paging Service, and the Business Radio Private Carrier Paging Service, with facilities located principally in Texas, Arkansas, Missouri, Mississippi, Louisiana, Oklahoma and Tennessee. In order to implement its wide-area paging system, on the frequency 157.74 MHz, Teletouch has invested approximately $100 million in capital equipment, including: transmitters, antenna systems, terminals, antenna towers, and customer service locations. Thus, if the Commission's proposal, to license the shared Part

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[1] In accordance with Rule Section 1.206(a)(1), two copies of these comments are being filed separately with the Office of the Secretary for inclusion in the record.

90 paging channels below 470 MHz[2] on market area basis is adopted, Teletouch will be adversely affected, especially as applied to the private carrier shared channels on which Teletouch's wholly-owned subsidiary, TLI is licensed.

Teletouch is currently in the process of building out its paging systems, having just recently acquired several private carrier paging licensees in Texas, Louisiana, and Oklahoma and filed expansion applications. The imposition of market area licensing in the shared frequency bands threatens Teletouch's ability to complete the build-out of these systems, and to expand, as necessary, in response to market forces to meet its customers' demands for service. These restrictions could ultimately force Teletouch to withdraw from the rural markets in which it has consistently provided service, since it would not be able to compete effectively, thereby resulting in a net loss of service to the public that may very well go unreplaced.

II. The Commission Should Not Auction the Shared Part 90 Frequencies.

The Commission's proposal to convert the shared private carrier paging channels to exclusive use, and then auction these channels is ill-founded and contrary to law. See Notice of Proposed Rulemaking (NPRM) at Para. 17; Comments of TLI at 2 - 5; Reply Comments of TLI at 4. The Commission recognized, at the outset of this proceeding, that the affected shared private carrier paging channels are heavily licensed in all of the desireable areas. See NPRM at Para. 17. It would be contrary to the public interest, for the Commission to disrupt the delicate balance created by the incumbent carriers, allowing them to provide a necessary and valuable service to the public on shared spectrum. This is especially true since an auction would probably generate little revenue as compared to the exclusive paging channels.

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[2] These ten channels include the two VHF high power paging channels 152.48 and 157.74 MHz, as well as eight UHF channels -- 462.750, 462.775, 462.800, 462.825, 462.850, 462.875, 462.900 and 462.925 MHz.

A. Auction of the Shared Paging Channels Exceeds the Commission's Statutory Authority.

The Commission's expressed concern that the Communications Act of 1934, as amended, may compel the auction of shared PCP channels because these stations have been reclassified as Commercial Mobile Radio Service (CMRS) operation. To the contrary, the Commission's proposal to convert the shared VHF and UHF paging bands to exclusivity, for the purpose of licensing by competitive bidding would violate the Act. Section 309(j)(7)(A) of the Communications Act of 1934, as amended (the Act), provides as follows:

> (7) CONSIDERATION OF REVENUES IN PUBLIC INTEREST DETERMINATIONS. --
>
> (A) CONSIDERATION PROHIBITED. -- In making a decision pursuant to section 303(c) to assign a band of frequencies to a use for which licenses or permits will be issued pursuant to this subsection, and in prescribing regulations pursuant to paragraph 4(C) of this subsection, the Commission may <u>not</u> base a finding of public interest, convenience, and necessity on the expectation of Federal revenues from the use of a system of competitive bidding under this subsection. (underlining added).

In adopting the <u>NPRM</u>, the Commission stated that geographic licensing would serve the public interest by (1) enhancing regulatory symmetry between one-way paging and narrowband PCS, and (2) streamlining regulatory procedures and application processing rules. <u>See</u> <u>NPRM</u> at Para. 21. In the context of shared use PCP channels, these justifications do not apply. <u>See</u> Comments of TLI at 5 - 8. The only other reason for converting the shared channels to exclusive use for licensing on a market area basis would be to garner revenue for the U.S. treasury. Pursuant to Section 309(j) of the Act, this is an impermissible justification for market area licensing. Indeed, the idea of imposing an auction scheme on shared users, taken together with the Commission's proposal to create arbitrary markets which bear no relationship to the logical growth pattern of existing shared paging systems,[3] is plainly arbitrary and capricious.

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[3] Traditionally, the development and expansion of paging systems has been on a site-by-site basis, dictated by subscriber demands for service in particular areas.

The record also reflects that market area licensing of shared spectrum would extend beyond the Commission's auction authority. The Commission may only auction spectrum to choose between mutually exclusive applicants. In that the private carrier VHF and UHF spectrum is shared, by definition there can be no mutual exclusivity between applications for this spectrum. Moreover, this heavily licensed spectrum is of little value to new entrants. See Comments of A+ Network at 18. Implementing exclusivity for the purpose of artificially creating mutual exclusivity in order to justify auctions is contrary to the authority granted to the Commission in Section 307(j)(7)(A) of the Communications Act of 1934, as amended (the Act). This portion of the auction statute prohibits the Commission from using competitive bidding for the primary purpose of creating revenues for the Federal treasury. Auction of this spectrum would also contravene Section 309(j)(6)(E) of the Act,[4] which directs the Commission to make every effort "through engineering solutions, negotiation, threshold qualifications, service regulations, and other means, in order to avoid mutual exclusivity in application and licensing proceedings." (underlining added). Shared use licensing is a method of avoiding mutual exclusivity in the application and licensing proceedings for the shared VHF and UHF frequencies. By adopting market area licensing for these channels, the Commission would flout the purpose and intent of Section 309(j)(6)(E) of the Act by artificially creating mutual exclusivity rather than avoiding it, as mandated by Congress. Accordingly, Teletouch urges the Commission not to adopt any proposal to auction the shared VHF and UHF paging spectrum.

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[4] Section 309(j)(6)(E) of the Act provides in pertinent part, as follows:

> (6) RULES OF CONSTRUCTION. - Nothing in this subsection, or in the use of competitive bidding, shall --
>
> (E) be construed to relieve the Commission of the obligation in the public interest to continue to use engineering solutions, negotiation, threshold qualifications, service regulations, and other means in order to avoid mutual exclusivity in application and licensing proceedings

B. Part 90 Shared Frequencies Are Not Suitable for Conversion to Exclusive Use.

The shared Part 90 paging frequencies are not suitable for conversion to exclusive use. The Commission has recognized that these frequencies are very heavily licensed by numerous carriers. A result of this heavy licensing has been that several carriers, with equal rights, have been able to make sharing suitable arrangements so that paging services on the Part 90 shared channels have been able to flourish. Such arrangements have included connecting terminals to prevent interference, use of mechanical arbitration devices to enforce fine sharing, carriers agreeing to haul multiple licensees' traffic over a single system, friendly consolidations, etc.

Teletouch believes, because of this heavy licensing, that conversion of the shared Part 90 paging channels to exclusive use, at this late date, is even less appropriate then when first considered, and rejected, by the Commission. Since 1993, when the Commission first declined to convert the shared use VHF and UHF paging channels to exclusive use in its PCP Exclusivity Order, significant licensing has occurred on these channels as carriers have attempted to buildout their systems or establish additional paging systems in order to meet subscriber demands for service. Accordingly, because the spectrum is even more heavily licensed, conversion to exclusive licensing and overlay auctions would be imprudent.

Unlike the exclusive common carrier paging channels (e.g., 152.24, 158.10, 931.2375 MHz, etc.), licensees in the shared Part 90 frequencies have been regulated under a separate set of rules with a separate set of standards. Because these standards may not have been as operationally desireable for many licensees, those carriers who chose to make use of the shared Part 90 paging channels did so at a large sacrifice -- forsaking the exclusive use of the frequency (or more simply put, sharing the frequencies with other co-channel licensees) in exchange for expedited license application processing and a virtually unlimited capability to expand their systems on an as needed basis in order to meet subscriber demands for service. This aspect of shared PCP operation is much the same as the licensing regime under which nation-wide licensees operate: These carriers have made a sacrifice to the Commission -- undertaking an ambitious nationwide build-out schedule in exchange for unlimited expansion rights on the channel. Thus, for the same reasons that the Commission has proposed to exclude the nation-wide paging channels from the its market area licensing proposal, so should it exclude the shared Part 90 paging channels. Indeed, it would be arbitrary and capacious to treat these similarly situated carriers so differently.

If the Commission nonetheless adopts market area licensing for the shared Part 90 paging frequencies and superimposes a market area licensee over the current licensees, Teletouch fears that the delicate balance on the shared Part 90 paging channels will be upset and that it and other incumbent licensees will placed at a distinct disadvantage, vis-a-vis the market area licensee. The winner of the market area licenses on what are now the shared Part 90 paging channels will have every incentive to exert its power to make these channels unusable by any of the incumbent licensees, so that their subscribers will be forced to migrate to other systems (if available). These auction winners will try to render the incumbent licensees' paging operations unprofitable. Teletouch submits that this is not an unforeseeable scenario, and could result from the market area licensee using such tactics as transmitting a large volume of voice pages, which consume a significant amount of air-time per page, rather than digital alpha/numeric pages, which are extremely spectrally efficient. Because the market area licensee would be able to transmit voice pages (and even repeat such pages) for a few customers, Teletouch and other similarly situated carriers, with 100,000 plus subscribers on the channel, could find it very difficult to transmit pages to their customers in a timely fashion with the remaining air-time. As a result, Teletouch believes that many pages would be lost, especially as the terminal buffers become full while awaiting the opportunity to transmit pages which are already in the que. This disruption to existing paging services would be very harmful, especially since many private carrier paging subscribers, e.g., hospitals, physicians, health care professionals, police officers, fire and rescue personnel, and utility company personnel, rely on their pagers to alert them in the event of a life-safety emergency.[5] Thus, any action by the market area licensee to "clear" the spectrum of incumbent services for his own use, and then create an exclusive regional paging system on what otherwise has been a shared channel, would be contrary to the public interest. This outcome would also be grossly unfair to existing shared users such as TLI, who has invested approximately $100 million in its paging system at the Commission's invitation, only to have the rules change. No proposal has been made to compensate TLI and others for the resulting lost investment.

Under the Commission's market area licensing proposal for the exclusive paging channels, the Commission has proposed to protect incumbent licensees from the potential for harmful interference from a market area licensee. However, unlike the exclusive paging frequencies, the shared paging channels contain no specific contours or boundaries, and hence, no auctionable white space. Without such finite boundaries, there can be no contours within which to protect incumbent carriers on the shared Part 90 channels. And because these channels have been shared for so many years, licensees have been authorized for transmitters that are literally stacked one atop another, such that if the systems were laid out on a map, it would appear like a stack of pancakes on a platter.

Because all of the carriers licensed on the shared Part 90 channels are on equal ground (i.e., no one carrier has superior rights over another to the frequency), the shared paging industry has been able to operate, as discussed above, with relative ease through various types of intercarrier arrangements. Under proposals being considered by the

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[5] Many fire and rescue departments with computer aided dispatch use commercial paging services to alert personnel on dispatched units to a call. A typical page will indicate the first due department, the type of incident (e.g., structure fire, medical emergency (and whether it is basic or advanced life support), automobile accident, fire alarm, etc.), address of the incident, and if a commercial structure, the name of the business. Thus, a fire department page might read, as follows: "CAD MSG: D*11 FIREALRM 7295 WILLIAMSON BL @HAMPTON INN."

Commission's staff, a market area licensee would be able to step into the shoes of a "spectrum manager," such that the Commission would, in effect, be providing the market area licensee with a bigger stick with which to beat the incumbent licensees into submission. Teletouch submits that such spectrum management would be contrary to the public interest, since it would result in a disruption of a necessary and vital communications service to the public.

C. Market Area Licensing of the Shared Channels Will Chill Carriers' Ability to Obtain Future Financing.

Most large paging carriers rely on public sources of investment (stock offerings) and/or private sources of funds (bank and insurance carrier financing, as well as investment banking) in order to raise the necessary capital to make equipment purchases in order to update current physical plant and/or expand existing paging systems. Additionally, lines of credit from institutional investors and banks are often essential to a carrier's ability to expand through the acquisition of existing paging systems from smaller carriers. Without the ability to secure this necessary financing, carriers such as Teletouch, which have specialized in providing commercial paging service on the Part 90 shared channels to customers in rural America, may not have the flexibility to make these acquisitions in order to expand their paging operations and meet subscriber demand as the paging industry experiences consolidation over the next several years.

As a paging company which has just recently refinanced its debt structure and obtained a new line of credit in order to acquire various carriers in the southwest United States, Teletouch knows firsthand how closely lenders concern themselves with the Commission's regulatory environment, and thus, the potential impact market area licensing for the shared Part 90 frequencies could have on the underwriting requirements of some investors and lenders, especially since the ultimate impact of the proposal on the shared Part 90 frequencies is unknown. This is so because, unlike the exclusive paging channels, there are no finite boundaries or established contours within which to protect an incumbent licensee's service from the whim of an overlaid market area licensee.

The uneasiness of the financial community will make it more difficult for paging carriers to obtain new financing, particularly for those carriers are heavily licensed on the Commission's shared paging frequencies, e.g., 152.48, 157.74, 462.775, 462.800, and 462.925 MHz, etc. While Teletouch has been fortunate, to date, it recognizes that lenders' willingness to initiate new lines of credit in the future may be jeopardized if the banking community perceives that market area licensing will have a material adverse effect on the paging industry. This is so because even earlier this year, just after the Commission issued its captioned Notice of Proposed Rulemaking, financial institutions were attempting to assess the potential impact, and hence, the potential risks associated with the Commission's proposal.

If, as a publicly traded corporation, Teletouch becomes unable to raise the venture capital necessary for it to accommodate current and future subscriber demands, a degradation in the level of service provided to its customers will certainly result, followed by an almost certain loss of subscriber base as customers become dissatisfied with the inability to expand and improve service offerings. Teletouch expects that any material loss of service, and hence revenues, could adversely affect a public stockholders and lenders. Since Teletouch is a niche company which primarily serves rural areas, if such a loss of service were to result, it is doubtful that another facilities-based carrier would be inclined to step in and fill the void left by Teletouch's departure because of the higher costs associated with serving such areas and the limited profit potential. As such, the public would suffer since a vital communications service would no longer be available.

D. Converting the Shared Channels to Exclusive Use Would be Unduly Expensive and Time Consuming for Incumbent Licensees

Teletouch understands that the Commission is considering a proposal to convert the shared paging frequencies to exclusive use, and believes that for the reasons set forth in

TLI's comments, that such a proposal would be ill advised. See Comments of TLI at 2 - 5. Additionally, Teletouch notes that if such a proposal were in fact adopted, the industry would be forced to expend large sums of money in order to determine the appropriate contours for each of the constructed and operating base stations that would be entitled to protection from the market area licensee. The engineering costs to survey each antenna site and calculate the affected base station contours would amount to hundreds, if not thousands of dollars per base station. For Teletouch, with several hundred base stations licensed and operating on the shared channels, the cost could exceed several hundred thousand dollars.

In order to determine contours for each affected base station, each antenna site would have to be individually surveyed in order to determine the precise parameters for each base station (e.g., type of antenna, orientation of the antenna, type of antenna structure, etc.) since such information is not included in the underlying facilities application.[6] Such an undertaking, to verify exact station parameters, could take several months or longer for large carriers such as Teletouch to accurately complete, and thus, would delay any efforts by the Commission to evaluate whether this spectrum is even auctionable. This information would be necessary in order to develop the stations' contours so that the Commission can determine what, if any "white space" remains for auction.[7] Because the expense associated

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[6] The only engineering information contained in a facilities application for the Part 90 shared paging services is station location, ground elevation, frequency, station class, emission, output power of the transmitter, effective radiated power of the transmitter, height above average terrain, and antenna height to tip. This information, while useful, is insufficient to calculate the reliable service area and interference contours of a particular base station.

[7] If the Commission insists, and proceeds with the adoption of market area licensing rules for the shared Part 90 paging channels, Teletouch recommends that the Commission utilize the interference formulas established by the Commission for the common carrier VHF and UHF frequency bands. These formulas, however, should take into account terrain and the fact that most paging facilities authorized in the VHF and UHF under Part 90 of the Commission's Rules operate at much higher power levels than those authorized under Part 22. In this way, at least, incumbent carriers would have finite and protected boundaries, and market area licensees would have any remaining white space, if any, within a particular market so that both the incumbent and market area licensees could theoretically operate on

with such an undertaking would be great, and would constitute an undue burden on smaller carriers, such a result would be anti-competitive and in contravention of Congress' mandate to protect small businesses, because of their contributions to universal service and their role in the U.S. economy.[8] By imposing such a burden on these small carriers, Teletouch believes that any effort to make the shared Part 90 paging channels exclusive will frustrate the Congressional goals underlying this legislation. This is exacerbated by the fact that the Commission has proposed not to auction the nation-wide paging frequencies, which are licensed to the industry heavy weights (e.g., ProNet, Inc., PageNet, etc.). Rather, the Commission has chosen to auction spectrum that is licensed to the small carriers, making it more difficult for these carriers to survive.

Congress also passed the Regulatory Flexibility Act, Pub. L. No. 96-354, 194 Stat. 1164 (1980), for the reason that "unnecessary regulations create entry barriers in many industries and discourage potential entrepreneurs from introducing beneficial products and processes." §2(a)(5). In passing this legislation, Congress found that the harmful effect of unnecessarily burdensome Federal Regulations on small businesses does not serve the public interest.[9] Because market area licensing on the shared channels would disproportionately

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an interference-free basis.

[8] A decade ago, small businesses produced 43% of the Gross National Product and provided 55% of the nation's jobs. "[B]etween 1969 and 1976, small business created almost two thirds of all new jobs in the national economy." Regulatory Reform: Hearings Before the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary, Part 3, 96th Cong., 1st Sess. 343, 344-45 (1979). (Small Business: A Critical Element of the American Economy, Remarks of Alfred Dougherty, Jr., Director, Bureau of Competition, Federal Trade Commission) [hereinafter "Dougherty Remarks"]). In the communications industry, small businesses are the largest provider of rural telecommunications (including mobile services such as paging), especially in those places where most larger carriers find that the population and the terrain do not justify their investment.

[9] "The public interest lies directly in two areas: (1) the disproportionate impact of governmental regulation on small businesses reduces the competitive capacity of small business, thereby placing Government in the strange position of encouraging economic concentration, and (2) consumers, to a large extent, must pay the cost of regulation in the form of higher prices. Thus, while the most immediate and visible impact may fall to the

impact small businesses by forcing them to potentially discontinue radio service to the public, Teletouch submits that any proposal to subject the shared Part 90 paging channels to market area licensing would contravene the legislative policy underlying the Regulatory Flexibility Act by decreasing competition in the market place.

In crafting its auction procedures, even for the proposed market area paging auction, the Commission has made participating in the auction, and thus, winning a market area license, very cumbersome. The procedures for preparing and filing the applications to enter the auction, submitting up front payments, making the actual bids, submitting winning payments, submitting the required long-form application are so precise and unforgiving of the slightest error without the imposition of a significant penalty. Because the Commission's auction rules have been so difficult, especially for smaller businesses, the rules, taken together with the application procedures, will effectively serve as a barrier to entry by bona fide small businesses, who are already incumbent licensees that may be seeking to preserve their ongoing business. Thus, as the Commission recognizes that there is little unlicensed spectrum left and few opportunities for new carriers, the overriding public interest in allowing the smaller existing carriers to improve their existing service to the public outweighs any benefit that the Commission might gain from an auction of the shared Part 90 paging channels.

III. Conclusion.

Teletouch implores the Commission not to adopt its proposed market area licensing scheme for the shared private carrier paging bands. In that these frequency bands are heavily licensed and congested with traffic, and subject to complex non-interference arrangements by multiple licensees (including internal use operators, mechanical arbitration, etc.), conversion of these frequencies to exclusive use and market area licensing would make

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small [business], the public shares the burden" in the form of higher prices. 126 Cong. Rec. 24,575, 24,588.

no sense. Further, the imposition of market area licensing will paralyze the shared channel paging industry so that it can no longer respond effectively to subscriber and market demands. As a result, subscribers will experience reduced coverage, especially where a licensee is not able to replace a lost site, or install an additional transmitter in order to meet subscribers' coverage requirements.

Respectfully submitted,

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